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No. 99-830

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IN THE

# Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska; GINA DUNNING, Director of Regulation and Licensure of the Nebraska Department of Health and Human Services; and CHARLES ANDREWS, M.D., Chief Medical Officer of the State of Nebraska,

*Petitioners*,

—v.—

LEROY H. CARHART, M.D.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Nebraska partial-birth abortion statute is unconstitutional under this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *Thornburgh v. ACOG*, 476 U.S. 747 (1986), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), because it bans a broad range of abortion procedures, including the safest methods of second-trimester abortion available in Nebraska, without regard to fetal viability and without any exception for the woman's health?

2. Whether the court of appeals properly declined to narrow the scope of the Nebraska partial-birth abortion statute because doing so would have required the court to rewrite the law and because such a narrowing construction would not cure its constitutional deficiencies?

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Respondent LeRoy Carhart, M.D., respectfully submits the following response to the petition for a writ of certiorari filed by the Attorney General of Nebraska ("the State").

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 192 F.3d 1142 (8th Cir. 1999).

## COUNTERSTATEMENT OF THE CASE

The State fails utterly to summarize the factual findings of the district court, instead preferring to rely largely upon hearsay contained in Congressional documents not in the record. This is because, quite simply, the State's arguments for reviewing the Nebraska partial-birth abortion ban statute ("the Act") are meritless, and the State can find no refuge in the facts of this case. The findings of the district court are nevertheless crucial to understanding the scope of the Act and the impact it would have on women's right to privacy in Nebraska, because those findings demonstrate that Dr. Carhart performs most second-trimester abortions in a sequence of steps that fits the Act's language precisely.

The district court found, and the State does not contest, that the phrase "partial-birth abortion" is not a medical term. S-5.[1] Indeed, for purposes of this case, it is a legal term defined in the Act. The State seeks, by *ipse dixit*, to equate the Act's definition of partial-birth abortion with one very specific abortion technique described by the district court.[2]

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[1] The supplemental appendix to the petition, containing the opinions of the district court, is cited herein as "S-[page number]"; the appendix bound with the petition is cited as "App. [page number]; and the Petition itself is cited as "Pet. [page number]." The appendix to this Brief is cited as "A-[page number]."

[2] The district court describes several D&E variants, all of which have been denominated "D&X" or "intact D&E" procedures. *See* S-14-18, 22-24. Yet another definition of D&X has been given by the federal district court in Wisconsin. *Planned Parenthood v. Doyle*, 44 F. Supp. 2d 975,

*See* Pet. at 3-4. But the uncontested facts found by the district court demand rejection of this proposed equation,[3] and instead fully support the conclusion of the court below that the Act "covers a great deal more," App. 4, than the sequence of steps put forward in the Petition. *See also* S-75 ("If the Nebraska legislature meant to ban only the D&X procedure, it did not accomplish its purpose.").[4]

The district court's opinion describes several methods of abortion in detail, namely suction curettage (also called vacuum aspiration); dilation and evacuation (D&E), as well

985 (W.D. Wis. 1999) (finding that abortion in which the physician suctions the cranial contents, crushes the skull or cuts the umbilical cord after "partially vaginally delivering a living child" constitutes a D&X prohibited by Wisconsin's law). It is completely unclear which of these possible variants of D&X the State seeks to equate with "partial-birth abortion."

[3] The State deceptively asserts that the district court "described the partial-birth abortion/D&X procedure as follows," Pet. 3, and then proceeds to quote a portion of the district court opinion which describes the "Intact Dilation and Evacuation (Intact D&E or D&X)," *see* S-14 (heading), S-33 (quoted section), not some amalgam of partial-birth abortion *and* D&X. The district court was quite clear that these two terms are distinct: one is a recognized medical procedure, *see* S-65-70, and the other is a broad term employed by the Act. Neither the State's fast and loose sleight of hand with the district court's opinion, however, nor its repeated use of the slash between the terms "partial-birth abortion" and "D&X," can render the two terms equivalent or change the plain language of the Act.

[4] The legislative history of the Act demonstrates that its sponsor, Senator Maurstad, faithfully tracked the language of similar pending federal legislation, amending the Nebraska bill only when they received word that the federal bill was amended. *See* Transcript of Legislative Debate at 6413-14 (Exh. 30) (May 12, 1997); 6796 (May 14, 1997); 7759-62 (May 20, 1997). But the sponsors of federal partial-birth abortion ban bill frankly acknowledged that its was not intended to ban one narrowly defined abortion method, but *any* method of abortion in which the fetus "was partially delivered and then killed -- no matter what the abortionist decides to call his particular technique." A-1 ("Dear Colleague" letter of U.S. Rep. Canady) (Exh. 31).



as one subset of the D&E called "intact dilation and evacuation" ("intact D&E") or "dilation and extraction" (D&X); labor induction; and the two non-vaginal types of abortion, hysterotomy and hysterectomy. *See* S-7-26. Its findings are based both on the testimony presented[5] as well as on two documentary exhibits, one an excerpt of a report of the American Medical Association (AMA), and the other a statement of policy of the American College of Obstetricians & Gynecologists (ACOG).[6]

As is relevant to the opinion of the court below, Respondent Carhart's surgical D&E method would violate the Act -- as would other techniques.[7] Consistent with the explanation of the D&E method provided by the AMA, in

[5] The district court found one of plaintiffs' experts, Dr. Phillip Stubblefield, "particularly persuasive," S-45, and summarized at length his description of various abortion procedures. *See* S-26-37. This testimony included opinions about how new, safer surgical abortion methods evolve. S-34. The State's lead expert, Dr. Boehm, also testified about how over time abortion techniques have become better with a lower "incidence of problems." S-43. This testimony is consistent with this Court's findings in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434-39 (1983), that the evolution of the D&E method rendered a second-trimester abortion hospitalization requirement, which was valid at the time of *Roe v. Wade*, 410 U.S. 113 (1973), invalid because such a requirement no longer promoted maternal health.

[6] The parties stipulated to the admissibility of all documents received into evidence by the district court, including these two. *See* S-6-7.

[7] In a companion case, the court below affirmed the finding of the federal district court in Iowa that Iowa's statute, virtually indistinguishable from the Act, could prohibit some first-trimester abortion suction curettage procedures, as well as some less common "combination" abortion techniques. *Planned Parenthood v. Miller*, No. 99-1372, 1999 WL 753770 at *2 (8th Cir. Sept. 24, 1999). The conflicting decision of the Seventh Circuit in *Hope Clinic v. Ryan*, Nos. 98-1726, 99-2528 & 99-2533, 1999 WL 974098 (7th Cir. Oct. 26, 1999), thus mischaracterizes the Eighth Circuit's opinions in the three cases it decided as reaching the decision that the statutes it reviewed were unconstitutional "only after first concluding that all three statutes forbid the D&E procedure." App. 32.

performing a D&E, Dr. Carhart uses ultrasound "to observe the fetus and the surrounding area," then uses "vacuum aspiration or forceps to rupture the membranes," and then "grasp[s] a portion of the fetus in order to bring it out of the uterus with long-handled forceps." S-11. Specifically, "he inserts an instrument inside the uterus, grabs a portion of the fetus, pulls it through the cervical os, and dismembers various fetal parts by the traction created between the instrument and the cervical os. The tearing of fetal parts from the fetal body is accomplished by means of traction at the cervical os." S-12 (citations omitted). Moreover, "[t]he surgeon deliberately intends that all of these events occur in order to perform the D&E, a procedure the surgeon knows and deliberately intends will kill the nonviable living fetus." S-79.

Thus, in performing a D&E in the manner recognized by experts and the AMA, Dr. Carhart satisfies each of the elements in the Act. He "deliberately and intentionally deliver[s] into the vagina a living unborn child, or a substantial portion thereof";[8] he does so "for the purpose of performing a procedure" he "knows will kill the unborn child and does kill the unborn child." *See* Pet. 2 (quoting the Act).

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[8] The district court held that the phrase "substantial portion" was void for vagueness, S-86-87, a holding not reached by the court of appeals. The court of appeals, instead, held that "if 'substantial portion' means an arm or a leg -- and surely it must," App. 16, the Act bans D&E, for once a physician draws a fetal limb out of the uterus (i.e., past the cervical os) in a D&E, she has deliberately and intentionally delivered a "substantial portion" of a living fetus into the vagina. The State does not question the conclusion of the court below that "substantial portion," whatever its boundaries may be, encompasses fetal limbs. Indeed, the sponsor of the Act in the Nebraska legislature opined that "substantial portion" meant "more than a little bit," or "[e]nough that would allow for the procedure to end up with the killing of the unborn child." *See* S-85; *see also* Transcript of Legislative Debate (Exh. 30) at 6440 ("[t]here are many, many definitions of many examples that could fit into the definition of 'partially'") (Maurstad).



He then completes the delivery of the "unborn child" by removing remaining fetal tissue, including placental tissue.

To be sure, when Dr. Carhart succeeds in performing the D&X-type variation of the D&E[9] in order to provide the safest care for some women, *see* n.10 *infra*, he also meets the elements of the Act. In such a procedure, he draws the fetus out of the uterus up to the head and then compresses the fetal head either by crushing it or by removing the cranial contents using suction. *See* S-17. Dr. Carhart uses the D&X-type technique "[i]n an effort to minimize perforation of the uterus or cervix by instruments used during a D&E or from piercing caused by fetal parts." *See* S-14; *see also* S-20 ("Carhart's intent to remove the fetus intact for any abortion performed past 15 weeks' gestation is aimed at reducing the chances of maternal complications or death."). Even the State's chief expert, Dr. Boehm, agreed that intact removal of a fetus during a D&E may have advantages for the woman. S-42. Thus, the district court found after hearing evidence on the preliminary injunction that "[s]tatistically, the D&X procedure is at least as safe as the D&E procedure and appreciably safer than all other forms of abortion," S-62, and, specifically, that "the variant of the D&X procedure used by Carhart is appreciably safer than the D&E procedure," S-62-63, for several reasons.[10] Indeed, after giving the State a full

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[9] The district court found that Dr. Carhart, "the only abortion provider in Nebraska who performs elective abortions past 16 weeks' gestation," S-6, "intends and prefers to remove the fetus using the intact D&E procedure," S-15, although only after the 18th week does the fetus come out intact. *Id.* Thus, in most later second-trimester abortions, Dr. Carhart attempts to perform a D&X-type procedure, though he may not always succeed.

[10] Specifically, the district court reiterated its finding that Dr. Carhart's variant of the D&X was safer than D&E because: "(a) it reduces instrumentation in the uterus that can cause damage to the uterus and cervix; (b) it reduces uterine or cervical perforation from bony fragments; (c) it prevents disseminated intravascular coagulopathy (DIC) and amniotic fluid embolus (among the most common causes of maternal mortality and complications); (d) it reduces the likelihood of retained

opportunity to present additional evidence at trial, the district court remained firm in its "decision that Nebraska's law endangers women by prohibiting Dr. Carhart from performing his version of the D&X procedure." S-64.[11]

In the face of this undisputed evidence that most abortions performed by Dr. Carhart after 15 weeks' gestation are prohibited by the Act's plain language, the State suggests, without citation, that it has disavowed application of the Act to D&E abortions. *See* Pet. 6. This is a misleading characterization of the State's position in this litigation. In fact, the State has only asserted that the Act does not apply to a D&E abortion in which the fetus is dismembered *in utero*. *See* Statements of State's counsel at oral argument before court of appeals, A-4 ("the dismemberment happens before the severed part enters the vaginal cavity"); A-5 ("Yes, but it's still attached, there's been no dismemberment in the vagina it takes place in the uterus and then the dismembered

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fetal parts (a 'horrible complication'); (e) it reduces the risk of 'free floating head,' an uncommon but significant complication; (f) because the D&X is less time consuming than dismembering the fetus, the woman has less operative time, which means less hemorrhage, less total bleeding and less risk of infection when the procedure is used." S-63. *See also* S-71 ("the evidence is both clear and convincing that Carhart's D&X procedure is superior to, and safer than, the D&E and other abortion procedures used during the relevant gestational period"); S-19-22 (explaining these findings in detail). These factual findings (indeed, all the district court's factual findings) were held to be "not clearly erroneous" by the court of appeals, App. 7, and the State does not claim otherwise in its Petition.

[11] Clearly, by prohibiting D&E abortions, which the undisputed evidence shows to be (statistically) the safest method of abortion through 20 weeks of pregnancy, *see* S-46 (summarizing statistical evidence from AMA), the Act endangers women's health. But even if the Act only prohibits D&X-type D&E abortions, it endangers women's health because the district court found the D&X variant used by Dr. Carhart "appreciably safer" than other D&E abortions. S-62; *see also* n.10 *supra*.



part is then passed through the vaginal cavity.").[12] But such a D&E would be less safe for women and is not deliberately performed by Dr. Carhart or by other physicians. *See* S-29 ("Due to the risk of uterine tearing and perforation, dismembering a fetus in utero is 'not done.'"). As the record establishes, in a D&E abortion, dismemberment occurs only *after* the intact fetus has been drawn partway into the vagina. S-12-13 Only by redefining D&E abortions to mean something (*in utero* dismemberment) that no physician ever sets out to do is the State able to say that the Act does not apply to D&E. Moreover, the State has (at times) described the Act as prohibiting *any* abortion involving "the intentional 1) partial delivery of a living fetus vaginally, 2) killing the fetus and 3) completing the delivery." Brief of State Appellants, *Carhart v. Stenberg*, Nos. 98-3245, 98-3300 (8th Cir.), at 66-67. Under this statement, the Act prohibits many more abortions than the single technique described on pages 3-4 of the Petition. *See* cases cited at n.13 *infra*.

## REASONS TO DENY THE WRIT OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE

The State correctly points out that the unanimous decision of the court below is in conflict with a sharply divided decision of the Seventh Circuit, namely *Hope Clinic v. Ryan*, Nos. 98-1726, 99-2528 & 99-2533, 1999 WL 974098 (7th Cir. Oct. 26, 1999).[13] The State, however,

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[12] No official transcript of the recording of the oral argument before the court below is available. However, the passage excerpted above is transcribed in the Appendix to this Brief. A copy of the audio recording has been lodged with the Clerk.

[13] The State fails to tell this Court, however, that the decision of the court below is consistent with *every other* lower court decision addressing a statute banning partial-birth abortion, including, notably, the decisions of six federal district courts (in the First, Third, Fourth, Sixth, Eighth and Ninth Circuits) that entered permanent injunctions against statutes that are virtually identical, word for word, with the Act. *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157, 1166 (S.D. Iowa 1998) (permanent

mischaracterizes the important federal question raised by this conflict, pointing instead to a conflict in the "reading" of similar state statutes. A mere conflict in the reading of two similarly, but not identically, worded state statutes is not an "important matter" within the meaning of Rule 10(a) of this Court. The remaining questions presented in the Petition are either not squarely raised in this case (*viz.*, "[w]hether a living human being delivered from its mother's body up to its head is a person for purposes of the Fourteenth Amendment," Pet. at i),[14] or seek plenary review of an entire body of this

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injunction against statute virtually identical to the Act based in part on finding that statute prohibits D&E abortions), *aff'd*, No. 99-1372SI, 1999 WL 753770 (8th Cir. Sept. 24, 1999); *Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998) (permanent injunction against statute virtually identical to the Act based in part on finding that statute prohibits D&E abortions), *appeal pending*, No. 99-5042 (3d Cir. argued Nov. 19, 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998) (permanent injunction against statute virtually identical to the Act based in part on finding that statute prohibits D&E abortions), *appeal pending*, No. 98-6671 (6th Cir. argued Dec. 15, 1999); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999) (permanent injunction against statute virtually identical to the Act based in part on finding that statute prohibits D&E abortions), *stayed pending appeal without opinion*, No. 99-2000 (4th Cir. Sept. 14, 1999); *Rhode Island Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288 (D.R.I. 1999) (permanent injunction against statute virtually identical to the Act based in part on finding that statute prohibits D&E abortions), *appeal stayed*, No. 99-2095 (1st Cir. Nov. 22, 1999); *Weyhrich v. Lance*, No. CV98-0117-S-BLW (D. Idaho Oct. 12, 1999). *See also Little Rock Family Planning Services v. Jegley*, No. LR-C-97-581 (E.D. Ark. Nov. 13, 1998), *aff'd*, 192 F.3d 794 (8th Cir. 1999); *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 619 (E.D. La. 1999), *appeal docketed*, No. 99-30324 (5th Cir. Apr. 5, 1999); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998), *appeal dismissed*, No. 99-4002 (11th Cir. Mar. 2, 1999); *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997), *appeal dismissed*, No. 97-17377 (9th Cir. Feb. 26, 1999); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

[14] Under no plausible construction of the Act does it prohibit only conduct directed at a "living human being delivered from its mother's body up to its head," nor does the State even bother to explain how such a construction is even possible. Instead, it applies to conduct directed at



Court's precedents (*viz.*, "[w]hether . . . the Court should now recognize that abortion is more properly a public policy legislative matter than a constitutional issue for judicial decision," *id.*). This last question does not merit full briefing and oral argument because this Court has recently, and definitively, rejected overruling *Roe v. Wade*, 410 U.S. 113 (1973).[15]

But two important questions are actually raised by this conflict; both should be decided by summarily affirming the court below. The first is whether the right to privacy guaranteed by this Court's decisions in *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *Thornburgh v. ACOG*, 476 U.S. 747 (1986), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), is to have any continuing vitality. Indeed, the State ultimately argues that *Roe* and its progeny should all be overruled by this Court in order to save the Act. Pet. at 16-18. The court below properly respected the vitality of these precedents, declining to rewrite the Act in a manner that, ultimately, would violate each of them. It holds, quite straightforwardly, that a statute whose plain language prohibits a sequence of actions undertaken by physicians in most second-trimester surgical abortion procedures is unconstitutional. *See Danforth*, 428 U.S. at 76-79. In contrast, the Seventh Circuit's opinion in *Hope Clinic* flouts each of these precedents by diminishing the scrutiny given to state laws

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any "living unborn child" if a "substantial portion" of it has been delivered from the woman's *uterus*. The Act does not define "substantial portion" as "up to the head," nor is it limited to delivery out of the woman's body.

[15] The question of whether to overrule *Roe*, was asked and answered in the negative by this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), after careful review of the value of *stare decisis* and the jurisprudential underpinnings of *Roe*. *Casey*, 505 U.S. at 854-69. Neither the State nor the Seventh Circuit in *Hope Clinic* presents any compelling argument that justifies revisiting the constitutional protection accorded a woman's right to terminate a pregnancy before viability.

infringing the right to abortion to, or below, rational basis review.

The second, subsidiary question is whether a broad state statute directly prohibiting constitutionally protected conduct -- like either Nebraska's or Wisconsin's -- may be rewritten by a federal court in a manner demonstrably contrary to the plain meaning of the language chosen by the legislature, and even when that rewriting of the statute still leaves it susceptible, on a number of grounds, to constitutional attack.[16]

Thus, if the Court grants the petition, it should grant it to decide the two questions described above and to summarily affirm the court below. This would resolve the conflict in the Circuits, which should be resolved, in a manner consistent with judicial economy. Then, upon a timely petition for review, this Court should summarily reverse the Seventh Circuit's decision in the *Hope Clinic* cases.[17] Doing so will resolve numerous pending cases regarding "partial-birth

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[16] The court below reached only one of the several grounds upon which the district court held the Act unconstitutional. The other grounds were: that the Act's prohibition on D&X-type abortions imposes an undue burden on the abortion right by requiring women "to endure appreciably greater risks to their health and lives than are necessary," S-73, *see also* S-70 n.37 (Act's "medical exception would not apply to Carhart's patients [obtaining D&X abortions] because risks to maternal health are not considered and relative surgical risks are not considered either"); and that the Act is void for vagueness because the phrase "substantial portion" is "meaningless to doctors, lay people and prosecutors alike," S-87. Each of these alternative grounds is firmly rooted in the decisions of this Court.

[17] In the *Hope Clinic* cases, the plaintiffs have indicated, by seeking a stay of the Seventh Circuit's mandate from Justice Stevens as Circuit Justice for the Seventh Circuit, their intention to petition for a writ of certiorari. Justice Stevens granted the stay, Nos. 99A427 and 99A428 (Stevens, Circuit Justice Nov. 30, 1999), thus effectively deferring enforcement of the Illinois and Wisconsin statutes at issue in those cases until this Court decides whether to grant review.



abortion" bans in litigation in numerous courts, *see* n.13 *supra*, and assist in forestalling future equally irrational efforts to interfere with the right to privacy. But if the Court restricts its consideration to the questions presented in the petition, the petition should be denied.

## I. THE DECISION OF THE COURT BELOW IS IN COMPLETE HARMONY WITH THIS COURT'S ABORTION DECISIONS AND SO SHOULD BE SUMMARILY AFFIRMED.

The State does not seriously contend that the decision of the court below conflicts with the abortion jurisprudence of this Court. Indeed, perhaps recognizing this, the State instead asks this Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and to subject women's privacy rights to the caprice of legislative majorities. Unfortunately, the Seventh Circuit's opinion in *Hope Clinic* dispenses with principles established in *Roe*, 410 U.S. at 165 (statute regulating abortion must contain exception for woman's health; statute regulating abortion must be "tailored to the recognized state interests," as well as important principles established in subsequent cases. *See Bolton*, 410 U.S. at 188 (physicians need not await a criminal prosecution to test validity of state abortion statute); *Danforth*, 428 U.S. at 77-79 (state may not ban abortion method even if it is not the safest method); *Colautti v. Franklin*, 439 U.S. 379, 390-97 (1979) (statute that, through imprecision, chills exercise of right to abortion is invalid); *Thornburgh*, 476 U.S. at 768-69 (state cannot interfere with physician's ability to keep woman's health paramount in choice of abortion method); *Casey*, 505 U.S. at 878-79 (if either purpose or effect of abortion statute is to impose undue burden, it is invalid; statute must further interest in potential life or maternal health; woman's health takes precedence over state's interest in potential life). As a consequence, a conflict has been created that should be

resolved summarily and definitively by this Court in favor of *Roe* and its progeny.

The State also asks this Court to overturn *Roe* in an alternative way: by recognizing that once any part of the living fetus, at any point in pregnancy, is in the vagina,[18] it is entitled to protection as a "partially born child" under the Fourteenth Amendment.[19] Such recognition would prohibit most abortions, because most abortions involve removing a living fetus part way out of the uterus before killing it. Thus, this proposed constitutional protection for the "partially born" is nothing more than a backdoor effort to overturn *Roe*, and should be rejected along with the State's frontal assault on *Roe*.

That the decision below is in complete agreement with this Court's precedents is hardly in dispute; it is the validity of the precedents themselves that the conflict with the Seventh Circuit raises. In *Danforth*, this Court reviewed a ban on abortions performed with "insertion of 'a saline or other fluid,'" 428 U.S. at 78 (quoting Missouri statute), finding that this broad language could also "include within its proscription the intra-amniotic injection of prostaglandin itself and other methods that may be developed in the future." *Id.* The Court did not narrow the statute at issue in *Danforth* to saline amniocentesis abortions only, both because the statute was (obviously) not susceptible to such a construction and because the statute, like the Nebraska

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[18] Apparently, out of either unfamiliarity with or disregard for women's anatomy, the State equates "outside the womb" with "outside the woman's body." However, the vagina is part of the woman's body, and the Act applies to any living fetus delivered into the vagina.

[19] The Act's text itself does not employ this proposed category of "partially born children." Instead, it uses the term "unborn child" to refer even to a living fetus that has been partly delivered into the vagina. *See generally* Pet. 2 (quoting the Neb. Rev. Stat. § 28-326(9) (Supp. 1998)). Thus, the State's proposed category comes across, at best, an effort at a *post hoc* rationalization for the Act.



partial-birth abortion ban, suffered from a number of other flaws.

Each of the Act's other constitutional deficiencies -- which make a rewriting of the Act doubly improper, *see* Point II *infra* -- are also established in this Court's precedents. First, the Act's lack of any health exception allowing the physician to use the prohibited methods (whatever they may be) renders it unconstitutional under *Casey*. 505 U.S. at 880.

Second, the Act's prohibition of abortions accomplished through vaginal removal of the fetus while failing to "prohibit techniques that are many times more likely to result in maternal death," *Danforth*, 428 U.S. at 78, demonstrates that it does not serve the state's interest in maternal health. *See generally Hodgson v. Minnesota*, 497 U.S. 417, 454-55 (1990) (Minnesota's failure to require involvement of two parents in any other area of decisionmaking by minors cast doubt on the reasonableness of such a requirement for abortion); *Planned Parenthood v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998) (Wisconsin statute banning partial birth-abortion does not serve state interest in maternal health). This is true even if the Act bans only some subset of D&E procedures, because at the same time the Act would clearly allow hysterotomy and hysterectomy procedures that are less safe than D&E procedures.[20]

Third, the Act does not serve the state's interest in potential life, or, assuming *arguendo* that it does, it does not do so by permissible means. Whether it bans most D&E

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[20] Moreover, even if labor induction methods of abortion were legal under the Act, it would fail to promote the state interest in maternal health. The district court found that, during the period from 16 to 20 weeks, when Dr. Carhart's abortion methods are prohibited by the Act, induction is not as safe for the woman, involves "greater pain and economic cost," and is "not generally available to most women in Nebraska." S-70 n.38.

abortions, or just those that meet some definition of D&X abortions, the Act would force women to undergo abortions that involve inducing fetal demise *in utero*, or else to forgo an abortion altogether. Not only did the district court find that causing fetal demise in utero "before the 20th week of pregnancy carries with it appreciable maternal health risks, no maternal benefits, and is not always possible," S-63; *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring in part and concurring in judgment) (statute which might have promoted state interest at cost of inflicting harm was still invalid), but inducing fetal demise obviously does not promote the state's interest in potential life. Of course, forcing women to forgo abortions altogether is simply impermissible.

Fourth, the purpose of the Act is solely to create obstacles to abortion, for, as explained above, it serves no legitimate state interest. Thus, the Act, like the saline amniocentesis method ban invalidated in *Danforth*, "comes into focus . . . as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." 428 U.S. at 79. Having no legitimate purpose, the Act fails the purpose prong of *Casey*'s undue burden test, for its purpose is simply to "hinder" women's free choice. *See Casey*, 505 U.S. at 877.

Moreover, although *Casey* authorizes the States to promote their interest in potential life by persuading the pregnant woman to carry her pregnancy to term (so long as the persuasive means chosen do not have the purpose or effect of imposing substantial obstacles),[21] it does not

[21] And, indeed, despite the State's hyperbolic protestation that "[i]f a State cannot ban the partial-birth abortion/D&X procedure, there is effectively no limit on abortion at all," Nebraska has enacted numerous statutes limiting abortion. First, consistent with *Roe*, Nebraska prohibits abortions after viability except where necessary to protect the woman's life or health, Neb. Rev. Stat. § 28-329, and requires any post-viability abortion to be performed by a method that favors fetal survival so long as that method is compatible with preserving the woman's life and health, Neb. Rev. Stat. § 28-330. Nebraska also enforces numerous statutes designed to promote its interest in potential life through means endorsed by this Court. Thus, it requires parental notice for unemancipated minors seeking abortions, Neb. Rev. Stat. §§ 71-6901-08, thereby giving parents an opportunity to persuade their daughters to carry to term; it prohibits most public funding for abortion, *see Orr v. Nelson*, 902 F. Supp 1019 (D. Neb. 1994), *aff'd*, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996), thereby "encouraging childbirth," *Harris v. McRae*, 448 U.S. 297, 325 (1980); and it requires women seeking abortions to receive certain state information designed to encourage childbirth at least 24 hours before the procedure, Neb. Rev. Stat. § 28-327. Each of these statutes is a limitation on abortion that appears to be consistent with the abortion jurisprudence of this Court. On the other hand, if Nebraska is permitted to ban "partial birth abortion/D&X," as it asserts it must be able to do, even where such a ban fails to promote any valid state interest, there would appear to be no limit on the State's power to ban both existing and newly developed safe and effective abortion techniques.



authorize the States to "promote" that interest by interfering with the method of abortion once the woman has decided to end her pregnancy despite all efforts to persuade her otherwise. Rather, this Court's precedents establish that government may not interfere with the woman's choice of abortion method, *see, e.g.*, *Thornburgh*, 476 U.S. at 768-69; *see also Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996), even after viability. This is because the decision about how the abortion should be carried out is one implicating the woman's right to bodily integrity, a strand of the woman's privacy right reaffirmed in *Thornburgh* that remains undiminished by *Casey*.

For these reasons, the Court should summarily affirm the decision of the Court below in an opinion that instructs the lower federal courts to respect the continuing vitality of *Roe* and *Casey* and intervening precedents.

## II. THE CONFLICT BETWEEN THE DECISION OF THE EIGHTH CIRCUIT BELOW AND THAT OF THE SEVENTH CIRCUIT SHOULD BE RESOLVED IN FAVOR OF THE JUDICIALLY-RESTRAINED APPROACH TO STATE STATUTORY CONSTRUCTION ADOPTED BY THE EIGHTH CIRCUIT.

It is a bedrock principle of this Court's jurisprudence and of our system of federalism that a federal court will not "rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). *See also Reno v. ACLU*, 521 U.S. 844, 884 (1997) (rejecting proposed narrow construction of nonseverable terms in federal statute because "the text or other source of congressional intent" failed to "identif[y] a clear line that this Court could draw"). Because the court below properly adhered to these principles, the conflict between its approach and the activist approach of the Seventh Circuit in *Hope Clinic* should be resolved in favor of the court below.

The court below properly refused to rewrite the Act for two reasons.[22] First, while a "narrowing construction" of a state statute in order to save it is permissible when the interpretation is one to which the state statute is "readily susceptible," *American Booksellers*, 484 U.S. at 397, the Act is not reasonably susceptible to a construction more limited than that which its plain language dictates. Instead, the State's proposed interpretation of the Act confining it to "only the D&X procedure," App. 16, would have required the court of appeals to "twist the words of the law and give them a meaning they cannot reasonably bear." *Id.*

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[22] In contrast, the conflicting *Hope Clinic* opinion eagerly rewrites two state's statutes, using the vehicle of unprecedented "precautionary injunctions" in an effort to limit their reach.



Second, a limiting interpretation of the Act, such as sought by the *Hope Clinic* court, would not "conform [the Act] to constitutional requirements." Instead, such a revision would simply create a new, but also unconstitutional statute, for reasons not reached by the court below but addressed by the district court:

(1) it would result in a prohibition on the safest previability abortion method available in Nebraska after 16 weeks. Such a prohibition is invalid under this Court's decisions in *Danforth* and in *Thornburgh v. ACOG*, 476 U.S. 747, 768-69 (1986), and conflicts with the basic premise of *Roe v. Wade*, 410 U.S. 113, 163-64 (1973), reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992), recognizing that maternal health trumps the state interest in fetal life throughout pregnancy;

(2) it would create a statute that serves no legitimate state interest whatsoever. By forcing a woman to use a less safe abortion technique, the Act would neither serve the state's interest in maternal health nor in potential life, thus violating the basic requirement of *Roe* and *Casey* that an abortion restriction must serve one of these interests by permissible means.[23] *See Doyle*, 162 F.3d at 470 (reversing denial of preliminary injunction against Wisconsin partial-birth abortion statute); and

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[23] The State adverts to "the States' interests in preserving human life," Pet. 13, but does not explain how fetal life can be preserved by the Act except by preventing women from having abortions at all, a result that is flatly unconstitutional. Moreover, the only other state interest asserted appears to be an interest in stopping "ghastly, cruel and painful" medical procedures. Pet. 17. Putting aside the fact that the record contains no evidence that any procedures banned by the Act are "ghastly, cruel [or] painful," it bears observation that, were this interest in preventing cruelty to the fetus legitimate, the State would employ it to justify banning all D&E abortions. *See id.* This result would require this Court to overturn *Roe*, *Casey*, *Thornburgh* and *Danforth*.

(3) it would replace the Act's use of the impermissibly vague term "substantial portion" with the vagueness inherent in trying to define a "D&X abortion," or a set of prohibited D&X variations, and in trying to describe what distinguishes such abortions from all other variations of the D&E abortion method. This vagueness is readily apparent in the effort by the Seventh Circuit in *Hope Clinic* to describe tentative "precautionary injunctions" that would temporarily limit the applicability of Illinois's and Wisconsin's partial-birth abortion bans to "D&X" abortions or to D&E abortions that are not "normal." There, the court of appeals directed that:

> [T]he state laws may not be applied to a normal D&E or induction until after the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation (which could arise either from civil litigation . . . or from criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X).

App. 43.

Thus, in contrast to the approach of the court below, the Seventh Circuit's approach runs afoul of this Court's understanding of separation of powers in two ways: it rewrites state statutes, thus usurping the authority of state legislatures; and it directs the issuance of federal "precautionary injunctions," thus usurping, in addition, the authority of state courts. The effect of this violation is profoundly harmful: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully be detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221 (1875) (*quoted in Reno*, 521 U.S.



at 885 n.49). *See also Whitehouse*, 66 F. Supp. 2d at 316 (observing that Fourth Circuit judge's "detailed editing of" language of Virginia partial-birth abortion ban in opinion staying preliminary injunction "confirms that a court could only save the [partial-birth abortion statute] by stepping in as a super-legislature"). As this Court reiterated in *Reno*, rewriting of statutes by judicial fiat removes the legislature's "incentive to draft a narrowly tailored law in the first place." *Osborne v. Ohio*, 495 U.S. 103, 121 (1990) (*quoted in Reno*, 521 U.S. at 885 n.50). In contrast to the Seventh Circuit's approach, the approach of the court below is consistent with these precedents. It takes the Nebraska Legislature at its word, and refuses, temporarily or permanently, to redraft the Act.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied, but, if granted, the decision below should be summarily affirmed.

Respectfully submitted,

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Dated: December 14, 1999.

# APPENDIX

**Exhibit 31**

Congress of the United States
House of Representatives
Washington, DC 20515

March 18, 1996

**H.R. 1833 is Constitutional**

Dear Colleague:

In a March 11 letter five of our colleagues cited an Ohio abortion case as proof that H.R. 1833, the Partial-Birth Abortion Ban Act, is unconstitutional. Even if the dubious reasoning of the Ohio court withstands an appeal, the decision has no bearing on H.R. 1833.

The Ohio bill attempted to ban "Dilation and Extraction (D&X)" or "Brain Suction" abortions. A district court judge found that the definition of the abortion technique was vague because there are several abortion techniques that use suction, and therefore, an abortionist might not have sufficient notice as to which technique was actually banned.

H.R. 1833 does not ban "D&X" or "Brain Suction" abortions. H.R. 1833 bans any "abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." The ban would have the effect of prohibiting any abortion in which a child was partially delivered and then killed -- no matter what the abortionist decides to call his particular technique.

*Roe v. Wade* declared that "unborn" children were not persons under out Constitution, but the decision left intact a

Texas statute that outlawed killing a partially born child. We are not considering the fate of unborn children in H.R. 1833. We are considering how our country will treat babies who are in the process of emerging from the womb.

But even if we considered these partially-born children to be non-persons, H.R. 1833 is constitutional under *Planned Parenthood v. Casey* because the ban does not place an "undue burden" on a woman's "right to choose" whether to have an abortion. There are a number of more widely used abortion techniques in both the second- and third-trimester of pregnancy. Even President Clinton, who has threatened to veto H.R. 1833, did not argue in his letter to the House and Senate Judiciary Committee Chairmen that the ban places an "undue burden" on women.

Regarding the issue whether a "health" exception is required, the Ohio case discusses this type of exception in the context of a ban on all third-trimester abortions. The discussion would not apply to a ban on a particular type of abortion. Even if the discussion did apply, H.R. 1833 allows any abortion in which the abortionist does not partially deliver the child alive before killing the child to be performed for "health" reasons. Inserting a "health" exception in H.R. 1833 would allow an abortionist to kill a child in the process of delivery for -- as the judge in the Ohio decision asserts -- both psychological and emotional reasons.

Opponents of H.R. 1833 cloak themselves in the mantle of *Roe v. Wade*, but even the *Roe* Court explicitly rejected the argument that the right to an abortion is absolute. The Court clearly stated that there is no right that entitles a woman "to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."

Our five colleages on the Judiciary Committee are still missing the point of the Partial-Birth Abortion Ban Act.



Let us be clear: in H.R. 1833, we are protecting children from having their lives taken while being delivered from their mother's womb. As a civilized society we can do no less.

Sincerely yours,

| | |
|---|---|
| /s/ | /s/ |
| Charles T. Canady | Henry J. Hyde |
| /s/ | /s/ |
| Bob Inglis | Michael P. Flanagan |
| /s/ | /s/ |
| F. James Sensenbrenner, Jr. | Martin R. Hoke |

**Excerpts from Oral Argument before the United States Court of Appeals for the Eighth Circuit,**
***Carhart v. Stenberg*, Nos. 98-3245 & 98-3300**
**(Apr. 19, 1999)**

THE COURT: Mr Grasz, if you lost a leg wouldn't you have lost a substantial portion of your body?

MR. GRASZ: Yes, your honor.

THE COURT: Well?

MR. GRASZ: However, that's, that's exactly my point, it has to be taken in the context of the statute read as a whole and I would like to go through point by point to explain how that is distinguished. What the plaintiff wants this Court to overlook is the fact that the meaning of the term substantial portion is never even an issue until a number of other thresholds are first crossed. The term substantial portion comes into play in the context of defining the phrase, partially delivers, vaginally, a living unborn child. Partial vaginal delivery of a living unborn child can not logically refer to passage of dismembered body parts through the vaginal cavity. One must strain to reach such a conclusion. And one technique that is used, is employed is to use an extremely technical definition of the word deliver rather than its common meaning. More importantly, Nebraska statute specifically requires that the partial delivery be deliberate and intentional *and* that it be done for the purpose of performing a procedure that is intended to kill the unborn child. The D&E abortion procedure simply does not fit the statutory definition of partial-birth abortion. Contradicting its own holding, the district court below graphically described how the dismemberment in a D&E abortion occurs due to traction against the cervical os. And I'm sure that counsel for the Appellant will disagree with this, but I think if you look at the record it's clear and I would quote the Appellees own



brief on page 12, quote, the dismemberment is a result of the traction of the fetus against the cervical os. In other words, the dismemberment happens before the severed part enters the vaginal cavity. Otherwise, it would be an unnecessary and purposeless mutilation. And I would cite the Sixth Circuit majority in *Voinovich* where they stated, quote the D&E procedure involves dismembering the fetus in utero before compressing the skull by means of suction. That's 130 F.3d at page 199 for the Sixth Circuit was distinguishing the D&E from the D&X procedure. The court then added a footnote at that point referring favorably to the federal language which is the same as Nebraska's statute, that's footnote number nine. In addition, the passage of severed parts through the vaginal cavity does not meet the death causing purpose requirement of the statute.

THE COURT: Could there not be an unsevered part in the D&E?

MR. GRASZ: Yes, but it's still attached, there's been no dismemberment in the vagina it takes place in the uterus and then the dismembered part is then passed through the vaginal cavity.